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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 716

SCHATTEN-CYPRESS COMPANY,
Petitioner,

v.

LEE SHOPS, INC.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Schatten-Cypress Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on August 27, 1965.

OPINION BELOW.

The opinion of the Court of Appeals is not yet reported. This opinion is, however, set forth in the Appendix, *infra.*

JURISDICTION.

The judgment of the Court of Appeals was entered on August 27, 1965 (App. *infra,* p. 33). A timely petition for rehearing was denied by an order entered on Septem-

ber 27, 1965 (App., *infra*, p. 34). By an order dated October 6, 1965, the issuance of the mandate of the Court of Appeals was stayed for thirty days, provided that a petition for writ of certiorari is filed in this Court within such thirty day period (App., *infra*, 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

I.

This was an action instituted by Lee Shops, Inc., against Schatten-Cypress Company to recover damages allegedly suffered by Lee Shops, Inc., on account of a claimed breach of an agreement to sublease certain property in Nashville, Tennessee. The agreement of the sublease was "subject to a loan from the Community Investment Corporation of Lawrence, Massachusetts, of $200,000.00, to be used in the construction of the building on said premises." The resolution of this litigation required that both the District Court and the Court of Appeals decide whether the investor, Community Investment Corporation, acted reasonably in its insistence upon the insertion of certain provisions in the original ground lease between the City of Nashville and Schatten-Cypress Company. The District Court held that the demands of Community Investment Corporation were "fair and reasonable" under the agreement to sublease, and the Court of Appeals held that the "clearly erroneous" doctrine of Rule 52 of the Federal Rules of Civil Procedure applied to this finding of the District Court. The first question presented is whether the Court of Appeals erred in applying the clearly erroneous rule to the District Court's resolution of a question which required the interpretation of a written contract, to-wit, the reasonableness of certain conduct under it.

II.

The District Court, in finding that Lee Shops obtained financing from another source, Hub Investment Company, stated that "this testimony as to alternate financing stands without dispute in the record." The Court of Appeals applied the clearly erroneous rule of Federal Rules of Civil Procedure 52 to this finding, even though there was a large amount of countervailing evidence, and despite the fact that the only evidence supporting it was contained in a deposition of a witness never seen by the trial court. The other question presented is whether the Court of Appeals erred in applying the clearly erroneous doctrine of Rule 52 to a finding based on evidence which the trial court mistakenly assumed was undisputed in the record, and which was supported only by deposition evidence.

RULE INVOLVED.

Rule 52(a) of the Federal Rules of Civil Procedure [28 U. S. C.] provides in pertinent part as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a trial court to judge of the credibility of the witnesses.

STATEMENT.

Although the record in this case is fairly voluminous, this is not a particularly complicated case. The action arises out of an alleged breach of a contract to execute a sublease on certain property in Nashville, Tennessee, and sought damages for the breach of contract charged. Sometime prior to August 19, 1960, Schatten-Cypress Company, petitioner, obtained an option from the City of Nashville to lease a tract of unimproved property owned by the City in the area of the new city airport terminal building. On August 19, 1960, Lee Shops and Schatten-Cypress Company entered into an agreement in which the latter agreed to complete then pending negotiations for the lease of the property under option. This agreement provided, among other things, that Schatten-Cypress would complete its negotiations for the leasing of the premises, construct a building of not less than 60,000 square feet with a parking lot which would accommodate a minimum of 600 cars and that the property would be leased to Lee Shops for a term of 15 years at a stated rental. The execution of the sublease was "subject to a loan from the Community Investment Corporation of Lawrence, Massachusetts, of Two Hundred Thousand ($200,000.00) Dollars, to be used in the construction of the building on said premises."

As the negotiations between Schatten-Cypress and the City of Nashville proceeded in regard to the ground lease, Community Investment Corporation, the proposed lender, objected to certain language therein. Under the version of paragraph 8 which finally appeared in the executed ground lease, and which was objected to by Community Investment Corporation, should the improvements on the demised premises be destroyed by an uninsured casualty, such as atomic blast or earthquake, Schatten-Cypress Company would be under an obligation to replace the

building prior to the surrender of the premises upon the termination of the lease, whether such termination occurred as a result of the term coming to an end or because of the breach of some covenant of the lease. Community Investment Corporation insisted upon language in paragraph 8 which would have relieved Schatten-Cypress Company of the obligation to replace the premises, regardless of how their destruction might come about.

There is considerable dispute in the record regarding the question of Schatten-Cypress' diligence in attempting to obtain the change in the language of the ground lease insisted upon by Community Investment Corporation. In any case, on December 6, 1960, the ground lease between Schatten-Cypress Company and the City of Nashville was executed, with the language in paragraph 8 objected to by Community Investment Corporation.

Sometime in the late spring or early summer of 1960, Schatten-Cypress Company began negotiations with the City of Nashville and with its real estate agent, Harper-Freeman & Co., regarding a ground lease on certain property in the vicinity of the new airport terminal building in Nashville, Tennessee (R. 158a).[1] This property was located on Murfreesboro Road in the City of Nashville, and at the time of the discovery of the availability of this property, Schatten-Cypress was looking for a piece of real estate in Nashville which would be suitable for the location of a "discount store", having had some inquiries for such property theretofore (R. 158a, 159a). On July 21, 1960, Schatten-Cypress and the City of Nashville entered into an option agreement, exercisable on or before February 21, 1961, to lease the

[1] "R." refers to the Appendix of the record which was filed in the Court of Appeals, nine copies of which have been filed in this Court, as provided for in Rule 21 (4) of the rules of this Court.

airport property on Murfreesboro Road for a 25 year term renewable for two consecutive 10 year periods (R. 38a, 160a). This option agreement provided that, if the option were exercised, the lease rental would be $12,000 annually, payable monthly for the first 25 years, with an $18,000 per year rental for any renewal periods, and in addition, required the lessee to construct at its own cost and expense "a one-story building, containing at least 60,000 square feet of floor space, and to pave completely the adjoining area" (R. 39a, 40a).

Almost immediately after the execution of the foregoing option agreement, Schatten-Cypress Company began negotiations with the plaintiff, Lee Shops, Inc., regarding a sublease of the property by Lee Shops for the operation of a discount store (R. 160a, 161a). Plaintiff, Lee Shops, was informed that, if it were to be the sub-tenant, it would be necessary that it undertake the responsibility of obtaining a lender to finance the construction of the building required by the ground lease from the City of Nashville to Schatten-Cypress (R. 165a). This commitment and obligation is recognized in the agreement to sublease which is an exhibit to the complaint; and indeed paragraph (7) specifically so provides (R. 10a).

Mr. I. R. Schulman, in consultation with legal counsel for the City of Nashville, prepared a draft of the proposed lease between the City and Schatten-Cypress (R. 201a, 202a). On October 7, 1960, a copy of the draft was sent to Mr. Benjamin Lacy, the counsel for Lee Shops, and on October 28, 1960, a copy of the proposed lease was sent to Mr. Milton C. Wasby, counsel for Community Investment Corporation (R. 205a, 206a). Paragraph 8 of this draft contained, as did the final executed lease, language which required the lessee to deliver up the lease premises upon the termination of the lease "in good condition as normal wear and usage would permit, damage by fire, other casualties and elements as are covered by ensurance

excepted" (R. 127a). This language was unacceptable to the attorney for Community Investment Corporation, Millton C. Wasby, as was certain similar language in paragraph 16 of the draft (R. 272a, 273a). The language desired by the attorney for Community Investment Corporation would have required the lessee (Schatten-Cypress Company) to quit and deliver up the premises at the termination of the lease "in good condition as normal wear and usage would permit, damage by fire, and other casualties excepted" (R. 89a).

This record is silent as to any reason or justification for the insistence upon the above-quoted language as opposed to the language of the draft, with the exception of Mr. Wasby's testimony contained in his deposition. There he stated in response to a question as to the reason for his objection to the words in paragraph 8 of the draft (R. 272a):

> I felt that the reference to the exception for damage by fire and elements as are covered by insurance excepted was not satisfactory from a tenant's point of view. In the first place, there was no reference to casualties other than fire and the elements and, in the second place, it was limited to things which were covered by insurance and I was concerned with an uninsured casualty occurring which would not be within the exception and which the tenant would nevertheless—would therefore have to repair or restore.

On November 10, 1960, Mr. Emanuel Schatten, the President of Schatten-Cypress Company, was in Boston to discuss the proposed sublease with Lee Shops and its counsel (R. 171a, 172a). At that time, Mr. Schatten signed a letter addressed to Community Investment Corporation in which Schatten-Cypress offered to sell the latter a promissory note in the amount of $238,065.93 for $200,000, this, of course, being the sum of money needed for the

construction of the building on the property which Schatten-Cypress proposed to lease from the City of Nashville (R. 76a). Exhibit B to the foregoing letter was a draft of the proposed lease between the City and Schatten-Cypress (R. 85a). Paragraph 8 of this draft, Exhibit B, contained the language regarding the condition of the premises upon the termination of the lease which was acceptable to Community Investment Corporation. The counsel for Schatten-Cypress Company, Mr. I. R. Schulman, was not present at the November 10, 1960, Boston meeting between Mr. Wasby, the Lee Shops' attorney, and Mr. Schatten (R. 207a). Mr. Schatten was at this time unaware that paragraph 8 of the draft lease, Exhibit B to the escrow letter, was a variance with the draft which had been agreed upon by the representatives of the City and Schatten-Cypress' counsel, Mr. Schulman (R. 172a). Because of this fact, the draft acceptable to Community Investment Corporation's counsel, Mr. Wasby, was not delivered by Mr. Schatten to his attorney, Mr. Schulman, upon his return to Nashville, and it was not until after the execution of the lease between the City and Schatten-Cypress that it was learned that the language in paragraph 8 was unacceptable to the lender, Community Investment Corporation (R. 207a).

On December 6, 1960, the appropriate officials of Schatten-Cypress Company executed the lease agreement for the airport property, and on December 22, 1960, the lease was signed by Ben West, Mayor of the City of Nashville, the form of the lease having been previously approved by City Council Resolution No. 60-714 (R. 121a, 171a). The period of this lease provided for a 25-year term with options of renewing or extending for two consecutive additional terms of 10 years' duration (R. 124a). Under this lease, the lessee, Schatten-Cypress Company, was to pay a monthly rental of $1,000, and in addition, within 270 days of the date of the lease, the lessee, Schatten-

Cypress, was required to construct a one-story building containing a minimum of 60,000 square feet of floor space and also completely pave all the adjoining area (R. 124a-26a). Subsequent to the execution of the lease, there were numerous discussions between Mr. I. R. Schulman, counsel for Schatten-Cypress Company, and Mr. Milton C. Wasby and Mr. Benjamin Lacy, counsel respectively for Community Investment Corporation, the lender, and Lee Shops, Inc., the prospective sublessee (R. 212a, 213a). There had also been discussions prior to the execution of the lease with the City between Mr. Schulman and Mr. Wasby and Mr. Lacy (R. 44a).

Community Investment Corporation, through its attorney, Milton C. Wasby, was insistent, following the execution of the lease with the City, that the lease be amended to incorporate the language desired by it in paragraph 8, despite the fact that such action necessitated further consideration and approval by the Nashville City Council (R. 154a-55a, 178a). While neither Schatten-Cypress Company nor its counsel could see any justification or reason for the change sought by Mr. Wasby, inquiries were made of the appropriate City officials, and it was determined that it was not politically feasible at that time to go back before the City Council and request that the language be altered (R. 178a, 219a). As late as December 29, 1960, Mr. Schulman, counsel for Schatten-Cypress Company, called on Mr. Wasby to waive his unreasonable objection to the language of paragraph 8 of the lease (R. 154a). Mr. Wasby refused to do so (R. 151a). Mr. Wasby suggested at one point that he might be able to get "Community to agree to go along" if he could get "a supplementary letter from Schatten-Cypress Company and Messrs. Schatten and Cypress personally to Community" guaranteeing "Community and its successors and assigns against any loss . . . in the event that the building was damaged or destroyed by an uninsured casualty" (R. 151a-52a). This proposal

was rejected by Schatten-Cypress (R. 150a, 152a). In rejecting this proposal, Mr. Schulman, attorney for Schatten-Cypress Company, on January 17, 1961, wrote both Mr. Wasby, counsel for Community Investment Corporation, and Mr. Lacy, counsel for Lee Shops, Inc., stating that since Community Investment Corporation was unwilling to make a commitment for the loan, his client, Schatten-Cypress Company, was of necessity terminating negotiations and would have to make other arrangements (R. 152a-53a).[2] At this time, Mr. Schulman returned to Mr. Lacy copies of the proposed lease which had been forwarded to him (R. 154a). Prior to this, on December 29, 1960, Mr. Schulman had written Mr. Wasby, called to his attention the urgency of concluding negotiations, asking the willingness of his client to accept the proposed lease as it then stood, and calling to his attention that construction plans which had been commenced were of necessity stopped until they heard from him and his client (R. 154a).

While all witnesses agree that there was some discussion regarding Lee Shops' obtaining an alternative source of financing in view of the impasse which had developed over the language in paragraph 8, there is some dispute in the proof as to whether the alternative financing was obtained and whether or not Lee Shops was given a specific time limit in which to obtain such financing. On either the 30th or 31st of January, 1961, Mr. I. R. Schulman, counsel for Schatten-Cypress, had a telephone conversation with Mr. Irving Helman, one of the attorneys for Lee Shops in Boston (R. 214a, 276a-77a). At that time Mr. Helman asked Mr. Schulman whether or not any alternative financing had been ob-

[2] The Court of Appeals mistakenly assumed that negotiations proceeded up to the time of the Zayre lease. The record definitely shows that termination of the agreement occurred on January 17. Lee Shops' efforts to reopen negotiations on January 30 or 31 did not constitute continued negotiations.

tained, and if such arrangements had not been made, would it be satisfactory if Lee Shops obtained alternative financing for the construction of the building on the leased property (R. 277a). Mr. Helman testified that he concluded a financing arrangement with a Boston firm called "Hub Investors, Inc.," and that he called Mr. Schulman to convey this information to Schatten-Cypress Company (R. 277a). On the other hand, Mr. Schulman testified in his deposition that in the telephone conversation of January 30 or 31, he made it very clear to Mr. Helman that it was of no concern to his client, Schatten-Cypress, where the money came from, but that "it is going to have to be within forty-eight hours" (R. 215a). Although Mr. Helman does not specifically name the date on which he called Mr. Schulman regarding the alleged new financing arrangement which he had made, Mr. Schulman testified that Mr. Helman did call him on February 6, 1961, at which time he [Helman] "said he thought he had a source of money" (R. 215a). At that time, Mr. Schulman related to Mr. Helman that the forty-eight hour time limit had long since expired, and that "another deal" had been consummated in the meantime (R. 215a).

The other deal of which Mr. Schulman spoke in his telephone conversation to Mr. Helman on February 6, 1961, was a sublease of the subject property to the Zayre Corporation. Because of the extreme emergency created by the unwillingness of Community Investment Corporation to provide the money necessary to construct the building required by the ground lease for the City, it was necessary for Schatten-Cypress to make new arrangements without delay (R. 184a). Consequently, Zayre Corporation, which had previously indicated some interest in the leased airport property, was contacted and a group of representatives from Schatten-Cypress traveled to Boston and stayed there until the lease was signed (R. 114a, 184a).

The minimum rental provided in the Zayre lease was $81,250, some $6,250 more than the minimum rental contemplated by the agreement between Lee Shops and Schatten-Cypress (R. 270a). The building constructed for Zayre Corporation is, however, 65,000 square feet in size as compared to 60,000 square feet contemplated for the Lee Shops building, and in addition, Schatten-Cypress is required to pay $4,062 a year as a broker's commission from its rental receipts (R. 270a). The base rental for both leases was $1.25 per square foot (R. 267a). The language of paragraph 8 of the ground lease between the City and Schatten-Cypress Company was never changed, and despite this fact, Third National Bank in Nashville provided some $250,000 in short term financing for the construction of the building and the New England Mutual Life Insurance Company of Boston, Massachusetts, made a $375,000 long term loan on the lease, both without any objection to the language (R. 259a).

The trial court held for the plaintiff, Lee Shops, and in so doing stated that "the defendant [Schatten-Cypress] had a duty to negotiate in good faith to obtain a lease from the City that was satisfactory to Community Investment Corporation so that the latter would make the proposed loan, it appearing that the change desired by Community was a fair and reasonable one." While the trial court found that Schatten-Cypress had not acted in good faith in complying with Community Investment requirements in the wording of the ground lease, the Court stated that "whether or not this is true is immaterial since the record conclusively shows that the plaintiff obtained financing from another source, Hub Investment Company" (R. 31a). Indeed the trial court stated that "this testimony as to alternate financing stands without dispute in the record" (R. 31a).

The Court of Appeals affirmed the judgment in the amount of $200,000 which was rendered by the trial court

against Schatten-Cypress. In so doing the Court agreed with the District Court that Schatten-Cypress "owed a duty to negotiate in good faith to obtain a lease from the City that was satisfactory to Community" (App. *infra*, p. 26). To this finding of the District Court, as well as the finding of the District Court that Schatten-Cypress had agreed to accept financing from the alternate investor, Hub Investment Company, the Court of Appeals applied the clearly erroneous doctrine of Rule 52(a) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT.

Petitioner is well aware that the fact alone that the opinions of the courts below have resulted in the awarding to respondent, Lee Shops, Inc., of a $200,000 windfall is not sufficient reason for granting the petition for writ of certiorari. We respectfully submit, however, that the Court of Appeals in its application of the "clearly erroneous" doctrine of Rule 52(a) of the Federal Rules of Civil Procedure has so far departed from accepted and well understood principles announced both by this Court and other Courts of Appeal as to call for the exercise of this Court's revisory jurisdiction by way of certiorari. Furthermore, the clearly erroneous doctrine continues to confound the Courts of Appeal, particularly when faced with an appeal involving the construction or interpretation of a written contract or document, and we respectfully suggest that this case is a proper vehicle for this Court to set out with clarity the principles by which the Courts of Appeal are to be governed in reviewing cases where there has been an interpretation of a contract or written document in the court below.

Unless this petition for writ of certiorari is granted and the Court of Appeals opinion reversed, it will be clear precedent for the proposition that a trial court's finding as to the reasonableness of the conduct of one of the par-

ties to a written contract, viewed in the light of that contract, is one which can be reviewed by the appellate court only within the restrictive confines of the clearly erroneous doctrine of Rule 52(a). The cases which have been decided under Rule 52(a) are in a sad enough state of disarray without adding to the confusing and conflicting decisions, a case which applies the clearly erroneous rule to a finding of law, or at best a mixed question of law and fact.

It is certainly true that the decision in this case both by the District Court and by the Court of Appeals required the ascertainment of whether or not Community Investment Corporation's insistence upon the change in paragraph 8 was reasonable or unreasonable. Significantly, the trial court itself had no illusions about the nature of this finding and its **Conclusion of Law No. 1** states that (R. 17a-18a):

> The defendant had a duty to negotiate in good faith to obtain a lease from the City that was satisfactory to the Community Investment Corporation, so that the latter would make the proposed loan, **it appearing that the change desired by Community was a fair and reasonable one.** (Emphasis supplied.)

Thus, it is seen that, even in the District Court's view, the requirement of "good faith" placed upon Schatten-Cypress by the trial court hinged upon whether the "change desired by Community was a fair and reasonable one."

First of all, any duty which Schatten-Cypress may have had to negotiate in good faith to obtain a lease from the City must have come into existence by virtue of the agreement of August 18, 1960, between Schatten-Cypress and Lee Shops, Inc. Therefore, even the finding of the duty to negotiate in good faith involves the interpretation of a written contract. More significantly, however, is the fact

that the crucial question of whether the change desired by Community was fair and reasonable, on which hinges the proper resolution of the question as to whether or not Schatten-Cypress carried out its alleged duty to act in good faith, requires analysis of the language of paragraph 8 in the sublease insisted upon by Community Investment and the language which actually appeared in the executed ground lease, and which Community Investment found objectionable. The language at the end of paragraph 8 dealing with the duties of Schatten-Cypress upon the termination of the lease where the premises had been destroyed, stated:

> "At such time, to quit and deliver up the leased premises together with all improvements thereon, to lessor peaceably, quietly, and in good condition as normal wear and usage would permit, damage by fire, other casualties and elements as are covered by insurance excepted."

The language insisted upon by Community Investment, the failure to include in the ground lease which ultimately resulted in the sublease from Schatten-Cypress to Lee Shops never being executed stated:

> "At such time, to quit and deliver up the leased premises together with all improvements thereon, to lessor peaceably, quietly, and in good condition as normal wear and usage would permit, damage by fire, and other casualties excepted."

The finding of the trial court that Community Investment Corporation was acting reasonably in demanding this change is demonstrably wrong, since the prime security for the loan of Community Investment Corporation to construct the building would of necessity be the sublease, and unless Schatten-Cypress had the duty to replace the building in the event of a casualty, this security would be lost. The Court of Appeals, of course, was in as good a position to interpret and analyze these clauses in the ground lease

as the District Court was, and we are firmly convinced that, had the Court of Appeals done so beyond the restrictive confines of the clearly erroneous doctrine of Rule 52(a), it would have encountered no difficulty in seeing the unreasonableness of Community Investment Corporation's insistence on the quoted language.

Curiously, the Sixth Circuit as long ago as 1942 held without qualification that the clearly erroneous doctrine of Rule 52(a) does not apply to a finding which involves interpretation of a contract, **Continental Illinois National Bank v. Ehrhart**, 127 F.2d 341, 343:

> **"The challenged finding involves the construction of the contract and raises a mixed question of law and fact."** (Emphasis supplied).

As recently as 1961, on a remand from this Court, the Sixth Circuit had occasion to deal with the problem of the application of the clearly erroneous doctrine to questions which involved the construction of a contract. In that case it was necessary to determine the meaning of the phrase "prices prevailing on date of shipment." The court below had made a finding on that regard with which the Court of Appeals disagreed. In that connection the Court stated in **Cordovan Associates, Inc. v. Dayton Rubber Company**, 290 F.2d 858, 860:

> "Moreover, not all findings labeled as findings of fact are binding on an Appellate Court where a finding designated as a finding of fact is not in reality a finding of fact, but is a conclusion of law or a mixed finding of fact and as a conclusion of law it is not binding on the Appellate Court. **Bogardus v. Commissioner**, 302 U.S. 34, 58 S. Ct. 61, 82 L. Ed. 32; **Weible v. United States**, 9 Cir., 1957, 24 F.2d 158; Chandler v. United States, 7 Cir., 1955, 226 F.2d 430."

One could hardly imagine a case which more clearly called out for the application of the above quoted rule as

set out by the Court of Appeals in **Cordovan Associates** than does the instant one. The question of reasonableness depends exclusively on what the court finds the disputed clauses in the ground lease to mean, when read in conjunction with all the other undisputed provisions of the ground lease. The court below was quite right when it stated in **Cordovan Associates, Inc.**, *supra*, that "the interpretation and construction of a written contract in matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule." The cases cited for that proposition certainly support it. See, e. g., **Crosley Radio Corp. v. Dart**, 160 F.2d 426 (6th Cir.); **Eddy v. Prudence Bonds Corp.**, 165 F.2d 157 (2nd Cir.), **cert. denied, Prudence Realization Corp. v. Eddy**, 333 U.S. 845; **Republic Pictures Corp. v. Rogers**, 213 F.2d 662 (9th Cir.); **United States v. John McShain**, 258 F.2d 422 (D. C. Cir.), **cert. denied**, 358 U.S. 832.

It is true that the courts of appeal pretty generally agree on the basic principle that the clearly erroneous rule does not apply to construction of written agreements, but a reading of the cases cited above, as well as others which have been decided will reveal that there is widespread confusion as to the exact type of finding involving a contract to which the clearly erroneous rule does not apply. See, e. g., **Iravani Mottaghi v. Barkey Importing Co.**, 244 F.2d 238 (2nd Cir.), **cert. denied**, 354 U.S. 939; **Dollar v. Land**, 184 F.2d 245 (D. C. Cir.), **cert. denied**, 340 U.S. 884; **Kell v. Gross**, 171 F.2d 215 (5th Cir.), **cert. denied**, 338 U.S. 815.

We respectfully submit that this is an appropriate case for this Court to provide for the guidance of the various courts of appeal the standards and principles which should be applied when receiving findings involving the construction or interpretation of written agreements or contracts, and the clearly erroneous doctrine of Rule 52(a) is relied

upon. A subsidiary benefit, we are convinced, will be the relieving of petitioner, Schatten-Cypress, from the burden of a $200,000 judgment which by no stretch of the imagination should ever have been imposed upon it.

B. The Court of Appeals found, however, that "in any event . . . Schatten-Cypress had waived the condition of the agreement as to the loan from Community in favor of a loan from Hub Investment Company (App., *infra*, pp. 26-27). In so doing the Court of Appeals upheld the finding of the trial court (R. 30a) by stating "in our judgment this finding was supported by substantial evidence and is not clearly erroneous" (App., *infra*, p. 27). The District Court's finding in this regard had been premised upon the theory that "this testimony as alternate financing stands without dispute in the record" (R. 31a). As a matter of fact—and this was repeatedly pointed out to the Court of Appeals—the evidence tending to prove that there was no commitment by Hub Investment Company far outweighs what little evidence there was which the District Court stated was "without dispute in the record." Thus, the finding sustained by application of the clearly erroneous rule was in fact based upon a misinterpretation and misconception of the record.

In general, however, and more important for the purposes of this petition, the application of the clearly erroneous rule to the District Court's finding with regard to the alternate financing is another in a long line of conflicting and irreconcilable decisions on the effect of the clearly erroneous doctrine of Rule 52 (a) on findings of a trial court supported by testimony which was adduced by deposition or by documentary evidence.

The portion of Rule 52(a) which requires that "due regard . . . be given to the opportunity of the trial court to judge of the credibility of the witnesses" has resulted in a serious split among the circuits as to whether or not the clearly erroneous doctrine of Rule

52(a) does apply to documentary evidence or evidence placed in the record by the means of a deposition, rather than by oral testimony before the trial judge himself. As Moore has pointed out (5 **MOORE'S FEDERAL PRACTICE**, ¶52.01[7], 1964 Supp.):

> In some of the cases, however, this further admonition of the rule [that due regard be given to the opportunity of the trial court to judge of the credibility of the witnesses] was raised from its position as subordinate to the basic provision to constitute a principle that where the testimony before the trial court was by deposition or the evidence was documentary, the reviewing court was in as good a position as the trial judge to evaluate it and thus could more easily discover the findings to be clearly erroneous.

The following cases have refused to apply the clearly erroneous rule to findings based on such evidence: **Fleming v. Palmer**, 123 F.2d 749 (1st Cir.), **cert. denied, Caribbean Embroidery Cooperative, Inc. v. Fleming**, 316 U.S. 662; **Banister v. Solomon**, 126 F.2d 740 (2d Cir.); **Ball v. Paramount Pictures, Inc.**, 169 F.2d 317 (3rd Cir.); **Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Crapet**, 199 F.2d 850 (5th Cir.); **Himmel Bros. Co. v. Serrick Corp.**, 122 F.2d 740 (7th Cir.); **State Farm Mutual Automobile Ins. Co. v. Bonacci**, 111 F.2d 412 (8th Cir.); **Smyth v. Barneson**, 181 F.2d 143 (9th Cir.); **Dollar v. Land**, 184 F.2d 245 (D. C. Cir.), **cert. denied, Sub. nom. Land v. Dollar**, 340 U.S. 884; **Panama Transport Co. v. The Maravi**, 165 F.2d 719 (2nd Cir.); **Stokes v. United States**, 165 F.2d 82 (2nd Cir.); **Bertel v. Panama Transport Co.**, 202 F.2d 247 (2nd Cir.); **Carter Oil Co. v. McQuigg**, 112 F.2d 275 (7th Cir.); **Orvis v. Higgins**, 180 F.2d 537 (2nd Cir.), **cert. denied**, 340 U.S. 810.

On the other hand other cases have held that the clearly erroneous doctrine of Rule 52(a) applies even to

evidence which was adduced by deposition or to documentary evidence and to findings based thereon. See, e.g. **Holt v. Werbe**, 198 F.2d 910 (8th Cir.); **Jacuzzi Bros., Inc. v. Berkeley Pump Co.**, 191 F.2d 632 (9th Cir.); **Quon v. Niagara Fire Ins. Co. of New York**, 190 F.2d 257 (9th Cir.); **Pendergrass v. New York Life Ins. Co.**, 181 F.2d 136 (8th Cir.).

The only evidence in the case at bar which in any way remotely supports the finding that an alternate financer in the person of Hub Investment Company was obtained by Lee Shops is the testimony of one Irving Helman, one of the attorneys for Lee Shops. This testimony was in the form of a deposition (R. 276a-78a). Hence, the Court of Appeals has applied the clearly erroneous doctrine to a piece of evidence which in our view it was quite as competent to appraise as the District Court.

A proposed (but unadopted) amendment to Rule 52 was made by this Court's Advisory Committee on the Federal Rules in its final report of October 1955 by adding certain language which would have removed the judicial gloss placed upon the rule by the first group of cases above. This proposed amendment was not one of the 1955 amendments which was adopted by this Court, but it is submitted that the time is here when this Court needs to set forth without equivocation which of the two groups of cases above have correctly interpreted Rule 52(a) as can be seen from examination of the cases. There is not only conflict among the circuits, but conflict between different panels at different times within the same circuits as to whether or not the clearly erroneous rule applies to documentary and deposition evidence. This case is a particularly appropriate one in which to resolve this matter once and for all.

CONCLUSION.

We believe that the errors in the decision of court below are manifest and that to the extent the Court has misapplied the clearly erroneous rule, the case should be reversed. This case has a particularly appropriate vehicle for this Court to set out authoritatively, once and for all, the principles and guidelines by which the Courts of Appeal are to be governed in reviewing findings of District Courts based on the interpretation or construction of written agreements or contracts, and to resolve the conflict which has arisen regarding the question of whether or not the clearly erroneous doctrine of Rule 52(a) applies to documentary and deposition evidence.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Sixth Circuit.

Before: Weick, Chief Judge, O'Sullivan and Edwards, Circuit Judges.

Weick, Chief Judge. The suit in the District Court was to recover damages in the amount of $250,000. for breach of contract to sublease premises located near the Nashville Municipal Airport. Jurisdiction was based on diversity of citizenship.

The case was tried by the District Judge without a jury. Adopting findings of fact and conclusions of law, he decided in favor of plaintiff and assessed damages in the sum of $200,000., for which amount he entered judgment against defendant. Additional findings and conclusions were made in a memorandum subsequently filed, denying defendant's motion to alter and amend and for a new trial.

In its appeal, Appellant Schatten-Cypress Company raised questions concerning its liability and also claimed error because anticipated profits were taken into account as a factor in determining the value of the sublease.

The City of Nashville had granted to Schatten-Cypress an option to lease vacant land located near the airport, for twenty-five years, at a rental of $12,000. annually, with the privilege of extending the lease for two additional periods of ten years each at a rental of $18,000. annually. The option agreement required Schatten-Cypress to construct at its own cost and expense a one-story building containing at least sixty thousand square feet of floor space and to pave the adjoining area. The improvements were to belong to the City upon termination of the lease.

Appellee, Lee Shops, Inc., was interested in subleasing the building to be erected on a portion of the premises for the purpose of operating a retail department store of the type known as a "discount house". There were no discount stores in the Nashville area at that time.

On August 17, 1960, Lee Shops submitted to the President of Schatten-Cypress a letter from Community Investment Corporation which indicated its willingness to make a loan of $240,000. under certain conditions, for the construction of a building on said premises.

On the following day a written agreement was entered into between Lee Shops and Schatten-Cypress, whereby the latter agreed to complete its negotiations for the leasing of said premises, to construct a building and parking area thereon, and to sublet the same to Lee Shops for a term of fifteen years, at an annual rental of two per cent of the first $4,000,000. of annual sales made in said building, plus one and one-half per cent of the next $2,000,000. of sales, plus one per cent of sales in excess of $6,000,000., with a minimum guaranteed rental of $75,000. per year. The sublease was to be "subject to a loan from Community Investment Corporation of Lawrence, Massachusetts, of $200,000., to be used in the construction of the building on said premises."

In October, 1960, Schatten-Cypress submitted to Community for approval a draft of a proposed lease from the City of Nashville to it. Paragraph 8 of the proposed lease provided that upon termination of the lease the lessee was required to deliver the premises in as good condition as normal wear and usage would permit, "damage by fire and other casualties and elements as are covered by insurance, excepted". Community objected to the quoted language and wanted it changed so as to read, "damage by fire and other casualties excepted". The reason for its objection was that the lessee might be required to restore the building if the damage resulted from

causes not covered by insurance. Schatten-Cypress agreed to negotiate with the City for a change in the draft.

On November 10th and 11th, 1960, Schatten-Cypress was further advised by Community's attorney of its insistence upon a change in the language of the City's lease, and Mr. Schatten stated that he did not expect any problem in getting it straightened out. In the letter-agreement dated November 11, 1960, it was made a condition of the loan that the lease from the City be executed in the form attached thereto as Exhibit B, which contained the language satisfactory to Community.

Despite all this knowledge of Community's requirements, Schatten-Cypress on December 6, 1960, without the knowledge or consent of Lee Shops or Community, and without making any request of the City to change paragraph 8 to conform to Community's requirement, proceeded to agree with the City to a form of lease which contained the objectionable features. This lease was approved by City Council and was signed by the City and Schatten-Cypress on December 21, 1960.

In the meantime Lee Shops caused a subsidiary to be organized under the laws of Tennessee. It executed the sublease, the performance of which was guaranteed by Lee Shops, and the papers were sent to Schatten-Cypress. It also incurred out-of-pocket expenses of $17,188.65.

Lee Shops and Community did not learn that Schatten-Cypress had executed the wrong form of lease with the City until after December 23, 1960.

The City had agreed to other changes in the form of the lease requested by Schatten-Cypress, but after it was executed Schatten-Cypress exerted very little effort to effectuate a further change.

In January, 1961, counsel for Community made a proposal to Schatten-Cypress to waive objections to the form

of the lease if Messrs. Schatten and Cypress as individuals would execute a guaranty that Community would suffer no loss as a result of the failure of paragraph 8 to contain the required language. Schatten-Cypress advised Community that it would not furnish such guaranty and that it would have to obtain the loan elsewhere.

On January 31, 1961 Lee Shops advised Schatten-Cypress that it could obtain the financing from Hub Investment Co., which would not require changing the form of the lease from the City. This was agreeable to Schatten-Cypress. Attorneys for Lee Shops then prepared the loan papers.

On February 6, 1961, Lee Shops again notified Schatten-Cypress that Hub had agreed to make the loan, at which time it learned that the premises had been subleased to Zayre Corporation for a period of twenty years with an option to renew for two additional terms of ten years, at a minimum rental of $81,250. per year. The building was to contain sixty-five thousand square feet of floor space and was to be constructed in accordance with plans satisfactory to Zayre.

The District Judge concluded that Schatten-Cypress owed a duty to negotiate in good faith to obtain a lease with the City that was satisfactory to Community, so that it would make the loan. He found that the change required by Community was a reasonable one. He further concluded that Schatten-Cypress breached its duty to negotiate in good faith, with the result that Community did not make the loan.

The District Judge further found that Schatten-Cypress had agreed to accept financing from Hub Investment Co. instead of from Community, and held that it breached its contract with Lee Shops by entering into the sublease with Zayre.

In its brief in chief Schatten-Cypress stated:

> "With one or two notable exceptions the proof in this case is not controverted. . . . It should be pointed out, we think, that the major difficulty is not what the facts are but as to the proper conclusions to be drawn therefrom. It is of these conclusions that we complain primarily in this appeal."

But it is settled that the clearly erroneous rule applies not only to factual findings but also to inferences drawn from established facts. **Commissioner v. Duberstein,** 363 U.S. 278 (1961); **United States v. United States Gypsum Co.,** 333 U.S. 364 (1947); **Cordovan Associates, Inc. v. Dayton Rubber Co.,** 290 F.2d 858 (C.A. 6, 1961).

In its reply brief Schatten-Cypress sets forth six of the findings of fact of the District Judge, which it claims are clearly erroneous.

The agreement to sublease entered into between Lee Shops and Schatten-Cypress contained no provision obligating Lee Shops to obtain financing for the construction of the building. The sublease, however, was to be subject to a loan from Community in the amount of $200,000. Community was procured by Lee Shops.

Under the circumstances Schatten-Cypress owed a duty to Lee Shops to comply in good faith with reasonable requirements of the lender. The District Court found that the requirement with respect to changing the language in the lease was reasonable; that there was no reason why the City of Nashville would not have agreed to the change had Schatten-Cypress made a bona fide effort to induce it to do so.

Even though obtaining the loan from Community was a condition precedent to the entering into of the sublease, Schatten-Cypress could not avoid liability by making the

performance of the condition impossible, or by preventing it. **Gulf Oil Corp. v. American Louisiana Pipe Line Co.**, 282 F.2d 401, 404 (C.A. 6, 1960).

In any event, the Court found that Schatten-Cypress had waived the condition of the agreement as to the loan from Community in favor of a loan from Hub Investment Company. Restatement, Contracts, §§ 296, 297; 17A C.J.S., Contracts, § 491, p. 690. In our judgment this finding was supported by substantial evidence and is not clearly erroneous.

The fact that negotiations with respect to the loan were carried on between the parties up to the time of the Zayre lease, is inconsistent with any claimed termination of the agreement to sublease. Apparently in January and the early part of February Schatten-Cypress was dealing with Lee Shops and with Zayre at the same time. Lee Shops had no knowledge that Schatten-Cypress was negotiating with Zayre. Lee Shops had every right to believe that its contract would be respected until it learned of the sublease to Zayre. In our opinion, the contract between Lee Shops and Schatten-Cypress to sublease was still in force and the rights of Lee Shops had not been cut off when the sublease to Zayre was made. The contract was breached by the sublease to Zayre.

Damages.

The principal issue over the damages relates to the testimony of Lee Shops' expert witness, Leo Klein, who was treasurer of the company. Klein had extensive experience in the leasing of stores in various parts of the country, extending over a period of twenty-eight years, of which ten to twelve years were devoted to leasing discount stores.

Klein testified as to the survey which he made of the location before the contract was made. He drove around Nashville with Mr. Schatten. He talked with real estate

operators, with the Chamber of Commerce, and with a banker.

He related his conversation with Mr. Schatten, who told him that a discount store was needed in Nashville and would be very successful; that he would be able to do a business of at least five million dollars a year at the airport location. After making his survey, Klein concluded that Schatten's statements were correct.

Klein testified that in valuing a lease on a discount store the estimated profit from operations is a factor which should be taken into account.

Klein prepared three profit and loss statements showing the estimated results of annual sales of five million dollars, four million, and three million dollars, respectively. He explained in detail the items on the statements, which included costs of goods and operations. The profit and loss statements were received in evidence. They showed respective annual profits of $71,000., $47,800., and $17,000., which, projected into the fifteen-year term of the sublease, would amount to $1,065,000., $717,000., and $256,500. respectively. He testified that the statement based on sales of five million dollars represented the best estimate he could determine, if the sublease had been granted to Lee Shops.

After Lee Shops offered evidence as to all of these matters, a hypothetical question was propounded to Mr. Klein, which he answered, as shown in footnote 1.

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[1] "Q. Taking into consideration your expected gross sales and your expected profit after deducting the operating expenses and all of the things that you have testified about concerning the location of the store, the area, the fact [159] that this would have been the only discount store in Nashville—the first discount store in Nashville—and all the other things that go into this, and based on your experience, do you have an opinion as to the value of the lease that Schatten-Cypress agreed

Schatten-Cypress offered no evidence to refute the testimony of Mr. Klein. It contended (1) that Klein did not qualify as an expert; and (2) that in determining the value of the sublease, he took into account a factor which was purely speculative, namely, anticipated profits in a new business location.

Whether or not Klein qualified as an expert was a matter which rested largely within the discretion of the trial judge, whose ruling may not be disturbed unless it is clearly erroneous. **Spitzer v. Stichman,** 278 F.2d 402, 409 (C.A. 2, 1960).

Klein was also in the position of an owner of Lee Stores. According to the overwhelming weight of authority, an owner is permitted to express an opinion as to the value of his own personal property. **Lawton v. Strong,** 249 F.2d 299, 302 (C.A. 6, 1957). We think there was ample evidence to support the ruling of the District Court which qualified Klein as an expert in the field of leasing stores. It was not clearly erroneous.

The District Judge recognized the rule in Tennessee that damages for breach of contract to lease are ordinarily measured by the excess of the rental value of the property over the agreed rent. **Jonas v. Noel,** 98 Tenn. 440 (1897); **Brummitt Tire Co. v. Sinclair Refining Co.,** 18 Tenn.App. 270 (1930). He quoted from **Jonas v. Noel,** however, to the effect that the purpose of the law is to give compensation for the loss of the bargain and to place

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to give you for that 15-year period and the fair market value of that lease in a situation where there was a buyer who was willing to buy but not compelled to buy, and a seller who was willing to sell but not compelled to sell—taking those things into consideration, what is the fair market value of that lease as of February 1960?

. . . .

"A. I would say in the general vicinity of 200 to 250 thousand dollars."

the damaged party in as good a position as he would have been in had his bargain been fulfilled. He found that no intelligent determination of the value of the sublease could be made without taking into account as a relevant factor the income which may reasonably be expected to accrue during the term of the sublease.

The expert witness did give his opinion as to the value of the sublease. The fact that in determining its value he took into account estimated income as one of the relevant factors, goes only to the weight of his testimony and not to its competency. **Hickman v. Coshocton Real Estate Co.**, 58 Ohio App. 38 (1936); **United States v. Ohio Water Service Co.**, 191 F.2d 648 (C.A. 6, 1951).

No case from Tennessee dealing with the precise point has been cited to us and we are uncertain as to how the Tennessee Courts would rule on the subject. We need decide only whether the District Judge reached a permissible conclusion in his determination of the local law. **Rudd-Melikian, Inc. v. Merritt**, 282 F.2d 924 (C.A. 6, 1960). In our opinion he has.

In **Sinclair Refining Co. v. Gutowski**, 195 F.2d 637 (C.A. 6, 1952), estimated profits were allowed in the computation of damages for breach of a lease of a gasoline filling station. Chief Judge Hicks, who wrote the opinion for the Court, said:

> "Appellant contends that the judgment for $8,000.00 should be set aside because it represents the loss to appellee of prospective damages; that the Sinclair station was a new business, and that the profits therefrom to appellee would be too speculative. There was expert testimony to the effect that this amount would represent the minimum profit that would be realized. We cannot say that the amount so fixed was not the natural and probable consequences of the breach or within the reasonable contemplation of the

parties. We find no reason for setting it aside or disturbing the discretion of the Court in sustaining it. See **Marquette Cement Mfg. Co. v. Campbell Const. Co.**, 6 Cir., 184 F.2d 352, 354" (640-641).

Loss of profits have been awarded as damages in Tennessee in certain types of breach of contract cases. **Inland Equipment Co. v. Tennessee Foundry & Machine Co.**, 192 Tenn. 548 (1951); **Joest v. John A. Denie's Sons Co.**, 174 Tenn. 410 (1939); **Gardner v. Deeds & Hersig**, 116 Tenn. 128 (1905).

In **Gardner** the Court cited as authority **United States v. Behan**, 110 U.S. 344 (1883), and quoted at pages 137-138 the following language from the opinion:

> "'The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, viz.: First, what he had already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of **Masterton v. Mayor of Brooklyn**, 7 Hill, 69, 42 Am. Dec., 38, they are "the direct and immediate fruits of the contract," they are free from this objection. They are then part and parcel of the contract it is entering into, and constitute a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.'"

See also Restatement, Contracts, § 331 (1932); 25 C. J. S., Damages, § 78.

Merely because the damages may be uncertain in amount or cannot be shown with certainty in the exact amount, does not mean that they cannot be recovered. It is sufficient if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. **Story Parchment Co. v. Patterson Parchment Paper Co.**, 282 U.S. 555 (1931).

Affirmed [August 27, 1965].

APPENDIX B.

Judgment.

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that the plaintiff-appellee recover from defendant-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Filed August 27, 1965.

APPENDIX C.

Upon consideration, it is Ordered that the petition for rehearing be and it is hereby denied.

Entered by order of the Court.

Filed September 27, 1965.

APPENDIX D.

Order Staying Mandate.

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Filed October 6, 1965.